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NO. 83-884

IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM, 1983

W. J. ESTELLE, JR., DIRECTOR
TEXAS DEPARTMENT OF CORRECTIONS,
Petitioner

V.

LARRY PLUNKETT,
Respondent

**Petition For Writ Of Certiorari To
The United States Court Of Appeals
For The Fifth Circuit**

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. DOES 28 U.S.C. §2254(d) PRECLUDE GRANTING OF HABEAS CORPUS RELIEF ON THE GROUND THAT THE JURY CHARGE AUTHORIZED CONVICTION ON A THEORY NOT ALLEGED IN THE INDICTMENT, WHERE THE STATE JUDICIARY HAS MADE EXPRESS FACTUAL FINDINGS THAT THE PORTION OF THE INSTRUCTIONS REFERRING TO THE NON-INDICTED CRIME DID NOT AUTHORIZE ON A THEORY CONVICTION NOT ALLEGED IN THE INDICTMENT, BUT RATHER DIRECTED THE JURY TO ACQUIT OF THE INDICTED CHARGE AND TO CONSIDER THE LESSER OFFENSE OF MANSLAUGHTER?

II. DOES THE PROCEDURAL DEFAULT DOCTRINE OF *WAINWRIGHT V. SYKES*, 433 U.S. 72 (1977) AND *ENGLE V. ISAAC*, 456 U.S. 107 (1982) BAR FEDERAL HABEAS REVIEW OF A PROSECUTOR'S CLOSING ARGUMENT IN DETERMINING WHETHER THE COURT'S CHARGE TO THE JURY WAS FUNDAMENTALLY DEFECTIVE, ABSENT A SHOWING OF GOOD CAUSE AND ACTUAL PREJUDICE, WHERE REVIEW OF SUCH ARGUMENT AS AN INDEPENDENT BASIS FOR RELIEF IS UNQUESTIONABLY BARRED?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

A. Course of Proceedings and Disposition Below 3

B. Statement of Facts 4

REASONS FOR GRANTING THE WRIT 9

I. THERE ARE SPECIAL AND IMPORTANT REASONS FOR GRANTING THE WRIT 9

II. THE STATE COURT'S DETERMINATION THAT THE COURT'S CHARGE TO THE JURY DID NOT PERMIT A CONVICTION FOR A NON-INDICTED OFFENSE IS TO BE ACCORDED A PRESUMPTION OF CORRECTNESS UNDER 28 U.S.C. §2254(d) 9

III. THE PROCEDURAL DEFAULT DOCTRINE OF *WAINWRIGHT V. SYKES*, 433 U.S. 72(1977) AND *ENGLE V. ISAAC*, 456U.S. 107 (1982) BARS FEDERAL HABEAS REVIEW OF A PROSECUTOR'S CLOSING ARGUMENT IN DETERMINING WHETHER THE COURT'S CHARGE TO THE JURY WAS FUNDAMENTALLY DEFECTIVE, ABSENT A SHOWING OF GOOD CAUSE AND ACTUAL PREJUDICE, WHERE REVIEW OF SUCH ARGUMENT AS AN INDEPENDENT BASIS FOR RELIEF IS UNQUESTIONABLY BARRED 11

CONCLUSION 14

INDEX OF AUTHORITIES

Cases **Page**

Engle v. Isaac, 456 U.S. 107 (1982) 9,11,12,13,14

Maggio v. Fulford, 103 S.Ct. 2261 (1983) 9,10

Marshall v. Lonberger, 103 S.Ct. 843 (1983) 9,10

Plunkett v. Estelle, 709 F.2d 1004, *reh. denied*, No. 82-1096, (5th Cir., Sept. 30, 1983) ..... *passim*

Plunkett v. State, 580 S.W.2d 815 (Tex.Crim.App. 1979)(*on rehearing en banc*) ..... *passim*

Smith v. Phillips, 455 U.S. 209 (1982). 10

Sumner v. Mata, 449 U.S. 539 (1981) 9,10

Wainwright v. Sykes, 433 U.S. 72 (1977) 9,11,12,13,14

Statutes

U.S. CONST. amend. V. 2

U.S. CONST. amend. XIV. 2

28 U.S.C. §1254(1). 2

28 U.S.C. §2254(d). 2

Tex. Penal Code Ann. art. 19.02 (Vernon) 2

NO. _____

IN THE
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W. J. ESTELLE, JR., DIRECTOR
TEXAS DEPARTMENT OF CORRECTIONS,
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V.

LARRY PLUNKETT,
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Petition For Writ Of Certiorari To
The United States Court Of Appeals
For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

The Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in this case on July 22, 1983, rehearing denied on September 30, 1983.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 709 F.2d 1004, *reh. denied*, No. 82-1096, (5th Cir., Sept. 30, 1983) (Appendices A and B). The report and recommen-

dation of the United States Magistrate, adopted by the district court, appears as Appendix C. The (*en banc*) opinion of the Texas Court of Criminal Appeals is reported at 580 S.W.2d 815 (Tex.Crim.App. 1979)(*on rehearing en banc*). (Appendix D).

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on July 22, 1983. A timely filed petition for rehearing *en banc* was denied on September 30, 1983. This petition for certiorari is filed within sixty days after final judgment in this case. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part, as follows:

> No person shall be . . . deprived of life, liberty, or property, without due process of law . . .

The Fourteenth Amendment provides, in pertinent part, as follows:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law . . .

Tex. Penal Code Ann. art. 19.02 (Vernon), which defines the offense of murder, provides, in pertinent part, as follows:

(a) A person commits an offense if he:

(1) intentionally or knowingly causes the death of an individual;

(2) intends to cause serious bodily injury and commits an act clearly dangerous to human life that causes the death of an individual . . .

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition Below.

Petitioner has custody of Respondent pursuant to the judgment and sentence of the 29th Judicial District Court of Palo Pinto County, Texas. On July 28, 1977, Respondent pleaded not guilty before a jury to an indictment alleging one count of murder. The jury, being given the option of finding Respondent guilty of either murder or the lesser included offense of involuntary manslaughter, found him guilty of murder and assessed punishment at fifty years imprisonment.

Respondent appealed to the Texas Court of Criminal Appeals, which, on November 15, 1978, reversed and remanded. On May 16, 1979, on the court's own motion for rehearing *en banc*, the Texas Court of Criminal Appeals affirmed the judgment of the trial court. *Plunkett v. State*, 580 S.W.2d 815 (Tex.Crim.App. 1979)(*on rehearing en banc*). Respondent has not filed any application for writ of habeas corpus in the state convicting court.

In the instant cause, Respondent applied to the United States district court seeking federal habeas relief in *Plunkett v. Estelle*, No. CA-4203K (N.D. Tex., Dec. 14, 1981). On December 14, 1981, the district court entered an order adopting the findings and recommendations of the magistrate and denied habeas corpus relief. The opinion of the United States Court of Appeals for the Fifth Circuit, reversing the decision of the district court and ordering that habeas relief be granted, was entered on July 22, 1983, with one judge dissenting. Treating Petitioner's suggestion for rehearing *en banc* as a petition for

panel rehearing, the Fifth Circuit denied rehearing on September 30, 1983. *Plunkett v. Estelle*, 709 F.2d 1004 (5th Cir. 1983), *reh. denied*, No. 82-1096 (5th Cir., Sept. 30, 1983).

B. Statement of Facts

The indictment returned against Respondent alleged that on or about January 8, 1975, he did:

> then and there intentionally and knowingly cause the death of an individual, April Dawn Peters, by striking her with his hands . . .

(Tr. 3, *see* Appendix F).

On January 7, 1975, Gayle Peters left her daughter, two-year-old April Dawn Peters, with Respondent so that she could go to the laundromat (SF 220-33). She returned an hour later to find an ambulance across the street from the apartment where she, April and the Respondent had been staying, and her daughter dead. Pictures of the child's body taken before the autopsy which showed extensive bruising to virtually every part of the child's body were shown to Ms. Peters. She testified that April did not have those bruises on her body when she last saw her alive approximately an hour before her death (SF 234).

An autopsy of April's body showed that her heart, liver, spleen and pancreas had all been severely torn. A pathologist testified that in his opinion these injuries would have caused April's death within a few minutes (SF 116, 125). The autopsy also showed a Y-shaped fracture all the way through the back and underportion of the child's skull. The long arm of this fracture was approximately 3¼ inches in length (SF 110). The pathologist testified that in his opinion this injury was thirty to forty-five minutes older than the injuries that were inflicted to

the child's abdomen because of the fact that extensive swelling had taken place in the child's brain (SF 126). He also testified that either the head injury or the abdominal injuries would alone have been sufficient to cause the child's death.

The autopsy also showed approximately thirty to forty bruises in the region of the child's left forehead, the two sides of the child's face, the front of her chest and abdomen, some of the region of the back, over her buttocks and on the front surfaces of both her thighs and lower legs (SF 108). In the region of her buttocks, the pathologist testified, these bruises were confluent or flowing together (SF 108). A picture submitted by the prosecution showed a solid mass of bruises on the child's entire buttocks with bruises on her back and down her legs. The pathologist testified that he believed the bruises to be somewhat less than twenty-four hours old (SF 144).

Respondent testified in his own behalf and admitted that he was supervising the child at the time of her death (SF 380). He testified that he was in the living room of his home when he heard a loud "thump" and "choking sounds" (SF 384). He testified that he went to the bedroom to find the child lying with her feet on the bed and her head on the floor. He testified that he attempted to resuscitate the child, and in his excitement may have used too much force on her chest and stomach. He testified that he panicked when April would not revive and went to the neighbors for help. He denied ever spanking the baby with a belt "too hard" or every hitting her with his closed fists, "other than for resuscitation" (SF 379). Respondent and various defense witnesses presented testimony tending to show that the child was "clumsy" and "easy to bruise". The state presented evidence in rebuttal, including pictures taken of the child between Christmas and January 1, 1975 and testimony concerning observations of the actions of the child during that time.

In applying the law to the facts of the case, the court instructed the jury as follows:

"3.

"Now if you find and believe from the evidence beyond a reasonable doubt that on or about the 8th day of January, 1975, in Palo Pinto County, Texas, the defendant, Larry Plunkett, did intentionally or knowingly cause the death of an individual, April Dawn Peters, by striking her with his hands, as set forth in the indictment, then you will find the defendant guilty of murder as charged in the indictment.

"Unless you so find beyond a reasonable doubt, or if you have a reasonable doubt thereof, you will acquit the defendant and find him not guilty of murder and consider whether he is guilty of the lesser offense of involuntary manslaughter.

"3A.

"You are instructed that to be guilty of murder, a defendant must have acted intentionally or knowingly in causing the death of the deceased. He must have intentionally or knowingly caused the death, *or he must have intended to cause serious bodily injury and have committed an act clearly dangerous to human life* that caused the death of deceased. *Unless* defendant so acted intentionally or knowingly or with intent to cause [illegible] injury to the deceased, *he cannot* be [illegible]

"Therefore, if you find [illegible] a reasonable doubt that the [illegible] Plunkett, did cause the death of [illegible]

> Peters by striking her with his hands, *but you have a reasonable doubt* that the defendant did intentionally or knowingly cause death or *that he intended to cause April Dawn Peters serious bodily injury*, then you *will acquit* the defendant of murder, and will consider whether or not he is guilty of involuntary manslaughter." [Emphasis added.]

See Appendix E. Respondent did not object to these instructions.

The Texas Court of Criminal Appeals found that although a theory not alleged in the indictment was included in paragraph 3A, the language read in the context of the entire paragraph constituted a reverse charge, directing acquittal and consideration of the lesser included offense. *Plunkett v. State*, 580 S.W.2d at 822. It found guidance for the jury in paragraph 3, which authorized conviction if the jury found that the Respondent committed murder as defined in the indictment and which directed the jury to consider the lesser included offense if it failed to find that murder, as set out in the indictment, was committed. The jury instruction read in the context of the overall charge, was found not to authorize a conviction on a theory not alleged in the indictment. *Id.*, at 822-23.

The Texas Court of Criminal Appeals refused to consider whether the prosecutor's final argument had any compounding effect on the surplus language of the charge. The prosecutor argued:

> The first paragraph of the charge in this case defines murder. And there is primarily two definitions of murder, a person commits murder if he intentionally and knowingly causes the death of an individual. That means I can plot, plan, lay and wait and shoot somebody, knowingly and in-

> tentionally shoot them, that's murder, or intends to cause serious bodily injury and commits an act clearly dangerous to human life that caused the death of an individual. That's the definition that applies to this case, doing an act clearly dangerous to health [sic] that results in death, and it's just most assuredly murder.
>
> * * *
>
> When Larry Plunkett was inflicting the injuries on this photograph to April Dawn Peters, when he was beating that girl, when he caused the skull fracture to her head, did he do something that caused her death? Did he do something that caused her death? That's murder, paragraph one, cause serious bodily injury and commit an act clearly dangerous to human life is murder just bigger than a goose. If it looks like a duck and walks like a duck and quacks like a duck, well, it's just a duck. Thank you, ladies and gentlemen.

(SF 481). The court found, and the record reflects, that no objection was made to this statement. The court further found that Respondent's trial default waived any error in this argument. *Plunkett v. State*, 580 S.W.2d at 823.

On July 22, 1983, a majority of a panel of the Fifth Circuit, Judge Brown dissenting, reversed the judgment of the district court and remanded the cause "with instructions that the district court set a reasonable time within which Texas may try Plunkett again." *Plunkett v. Estelle*, 709 F.2d 1004 (5th Cir. 1983). In reaching its decision that there was no support in the record for the determination of the Texas Court of Criminal Appeals that the charge did not permit the jury to convict for a non-indicted offense, the majority reasoned that the Texas Court of Criminal Appeals improperly declined to consider the pro-

secutor's final argument in reaching its determination. It held that while the Texas contemporaneous objection rule precluded review of Respondent's claim of improper prosecutorial argument as an independent ground for relief, consideration of the prosecutor's argument in the context of whether a reasonable juror could have interpreted the instruction as allowing a conviction on a non-indicted offense was proper. The Fifth Circuit found that given the charge as presented to the jury and the evidence adduced at trial, a reasonable juror could have convicted Respondent of a distinct crime that the state had not charged.

REASONS FOR GRANTING THE WRIT

I.

THERE ARE SPECIAL AND IMPORTANT REASONS FOR GRANTING THE WRIT.

There are special and important reasons to consider the issues presented herein. In granting habeas corpus relief on the grounds that the jury charge authorized a conviction not alleged in the indictment, the Court of Appeals failed to accord the findings of the Court of Criminal Appeals the high measure of deference dictated by this Court in *Sumner v. Mata*, 449 U.S. 539 (1981), *Marshall v. Lonberger*, 103 S.C.t 843 (1983); and *Maggio v. Fulford*, 103 S.Ct. 2261 (1983). Further, in so doing, the Fifth Circuit has carved an exception to the procedural default doctrine of *Wainwright v. Sykes*, 443 U.S. 72 (1977) and *Engle v. Isaac*, 456 U.S. 107 (1982), not previously recognized.

II.

THE STATE COURT'S DETERMINATION THAT THE COURT'S CHARGE TO THE JURY DID NOT PERMIT A CONVICTION FOR A NON-INDICTED

OFFENSE IS TO BE ACCORDED A PRESUMPTION OF CORRECTNESS UNDER 28 U.S.C. §2254(d).

On direct appeal, the Texas Court of Criminal Appeals found that although a theory not alleged in the indictment was included in Paragraph 3A of the instructions, the jury charge did not *authorize a conviction* on an unindicted offense. The Texas court found that the language of Paragraph 3A, read in the context of the entire paragraph, did not direct a finding of guilt, but rather constituted a reverse charge, directing the jury to acquit and to consider the lesser offense of manslaughter, if it failed to find certain facts beyond a reasonable doubt. It further found guidance for the jury in paragraph 3, which authorized conviction if the jury found that the Respondent committed murder as defined in the indictment and which directed the jury to consider the lesser included offense if it failed to find that murder, as set out in the indictment, was committed. The jury instruction, read in the context of the overall charge, was found not to authorize a conviction on a theory not alleged in the indictment. *Plunkett v. State*, 850 S.W.2d at 822-23.

Recent Supreme Court interpretations of 28 U.S.C. §2254(d) teach that the factual determinations made by state trial courts and state appellate courts are to be accorded a high measure of deference by reviewing federal courts. *Sumner v. Mata*, 449 U.S. 539, 547 (1981). This measure of deference to be accorded

> . . . requires that a federal habeas court more than simply disagree with the state before rejecting its factual determinations. Instead, it must conclude that the state court's finding lacked even "fair[] support" in the record.

Marshall v. Lonberger, 103 S.Ct. 843, 850 (1983); *see Maggio v. Fulford*, 103 S.Ct. 2261, 2264 (1983); *Smith v. Phillips*, 455 U.S. 209, 218 (1982).

The Fifth Circuit disregarded this Court's teachings in *Sumner*, *Marshall* and *Fulford* by failing to accord a high measure of deference to the factual determinations made by the Texas court. As the dissent correctly observes, the Texas court's interpretation of the jury instructions is clearly supported by the actual language of Paragraph 3A, the actual language of the entire charge, and the record as a whole. This support for the Texas court's interpretations was not disputed by the Court of Appeals, and, in fact, the Fifth Circuit acknowledged that "had nothing else occurred but the charge," they "would be inclined to agree" with the interpretation of the Texas court. *Plunkett v. Estelle*, 709 F.2d 1008; *see* Appendix B. The Fifth Circuit however, reasoned that because the Texas Court declined to consider the argrument of the prosecutor in determining whether the charge authorized an unindicted offense, the Texas court's determination was not supported by the record. This justification for the Fifth Circuit's interpretation of the record disregards the standard of review established by this Court, that a federal habeas court defer to the factual findings of the state courts unless it concludes that such findings "lack even 'fair support' in the record."

III.

THE PROCEDURAL DEFAULT DOCTRINE OF *WAINWRIGHT V. SYKES*, 433 U.S. 72 (1977) AND *ENGLE V. ISAAC*, 456 U.S. 107 (1982) BARS FEDERAL HABEAS REVIEW OF A PROSECUTOR'S CLOSING ARGUMENT IN DETERMINING WHETHER THE COURT'S CHARGE TO THE JURY WAS FUNDAMENTALLY DEFECTIVE, ABSENT A SHOWING OF GOOD CAUSE AND ACTUAL PREJUDICE, WHERE REVIEW OF SUCH ARGUMENT AS AN INDEPENDENT BASIS FOR RELIEF IS UNQUESTIONABLY BARRED.

The Texas Court of Criminal Appeals refused review of Respondent's claim that the jury was charged with an unindicted offense. The Texas court found, and the record reflects, that Respondent failed to make any objection to the jury charge. *Plunkett v. State*, 580 at 821. Under Texas law, review of an unobjected to jury charge is limited to fundamental error. *Id.* In this context, fundamental error arises only when the charge *authorizes* a conviction on a theory not alleged in the indictment, not merely because surplus language has been included in the instructions. *Plunkett v. State*, 580 S.W.2d at 822. The Texas court found that the jury instructions *did not authorize* a conviction on an unindicted offense and thus, the charge was not fundamentally defective.

The Texas Court refused to review the prosecutor's closing argument to determine whether it had any compounding effect on the surplus language in Paragraph 3A. It reasoned that any error in the argument was waived by Respondent's failure to object. *Id.* Thus, the Texas court limited its determination of whether the charge authorized a conviction on a theory not alleged in the indictment to the actual language of the charge.

The procedural default doctrine enunciated in *Engle v. Isaac*, 445 U.S. 107 (1982) and *Wainwright v. Sykes*, 433 U.S. 72 (1977) teaches that absent cause for the procedural default and actual prejudice from the error, principles of comity and federalism prevent federal courts from granting habeas relief to a state prisoner whose claim is nonreviewable in state courts because of the default. The court below, construing the instructions in light of the prosecutor's argument, clearly disregarded the state court's proper application of its contemporaneous objection rule, and extended its review past the limits imposed by the Texas Court of Criminal Appeals, without any showing of good cause for the procedural default.

The failure of the Court of Appeals to limit its scope of review to that exercised by the Texas court seriously undermines the principles of the procedural default doctrine. The policy underlying the procedural default rule is a recognition that the state's interest in finality of litigation, the prominence of the trial and the need to adhere to established safeguards, and the state's right to punish offenders and to honor constitutional rights are significantly frustrated by federal intrusion into state trials. *Engle v. Isaac*, 456 U.S. at 126-28. *Isaac* and *Sykes* recognize that the costs to these interests are "particularly high when a trial default has barred a prisoner from obtaining adjudication of his constitutional claim in the state courts." *Engle v. Isaac*, 447 U.S. at 129. Such a default deprives the state of its opportunity to correct the defects and to avoid problematic retrials and federal intrusion into its trials. *Id.* The considerations militating in favor of honoring the procedural default rule have been expressly recognized as supporting the Wainwright v. Sykes ruling that procedural default bars federal habeas relief absent a showing of cause and actual prejudice. *Id. See, Wainwright v. Sykes*, 433 U.S. at 88-90, for discussion of the supporting considerations.

The Court of Appeals' decision to expand the scope of its review past that exercised by the state court without requiring the Respondent to demonstrate good cause and actual prejudice for his trial default encourages a defense counsel to withhold objections, to "deliberately choose to withhold a claim in order to 'sandbag' — to gamble on acquittal while saving a dispositive claim in case the gamble does not pay off." *Engle v. Isaac*, 456 U.S. at 129 n.34. Further, such witholding of objections deprives the trial court of its opportunity to correct any defects in the argument, to nullify any compounding effects, and thus to eliminate any possibility that the jury might be misled by confusing, although not erroneous, language in the charge. By neglecting to object to the prosecutor's argument, Respondent has enhanced his chance for reversal on appeal or in federal habeas corpus.

As the Fifth Circuit opinion acknowledges and the dissent expressly recognizes, the unobjected to instruction alone, read in the context of the overall charge to the jury, did not expressly authorize the jury to convict on a non-indicted offense. *Plunkett v. Estelle*, 709 F.2d at 1008. Moreover, it is not disputed that the application of the Texas contemporaneous objection rule precludes federal habeas review of the prosecutor's closing argument to the jury as an independent ground for relief. *Id.* Thus, neither claim, taken alone, would entitle Respondent to federal habeas relief. The Fifth Circuit's decision to combine two claims, both of which are independently barred under the procedural default doctrine, to consider cumulatively these errors and to extend its scope of review further than that exercised by the state courts, without requiring Respondent to demonstrate good cause for the default and actual prejudice, offends the teachings of *Engle v. Isaac* and *Wainwright v. Sykes*.

CONCLUSION

For these reasons, Petitioner respectfully prays that the petition for certiorari to the United States Court of Appeals for the Fifth Circuit issue.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS

No. 82-1096

LARRY PLUNKETT,
Petitioner-Appellant

versus

W.J. ESTELLE, JR., Director
Texas Department of Corrections,
Respondent-Appellee.

Appeal from the United States District Court for the Northern District of Texas

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ON SUGGESTION FOR REHEARING EN BANC

(Opinion 7/22/83, 5 Cir., 198__, _____F.2d_____)
(September 30, 1983)

Before BROWN, GOLDBERG AND HIGGINBOTHAM, Circuit Judges.

PER CURIAM:

(X) Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge in regular active service of this Court

having requested that the Court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

( ) Treating the suggestion for rehearing en banc as a petition for panel rehearing, the petition for panel rehearing is DENIED. The judges in regular active service of this Court having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/

United States Circuit Judge

APPENDIX B

Larry PLUNKETT, Petitioner-Appellant.

v.

W.J. ESTELLE, Jr., Director, Texas Department of Corrections,
Respondent-Appellee.

No. 82-1096.

United States Court of Appeals,
Fifth Circuit.

July 22, 1983.

Appeal from the United States District Court for the Northern District of Texas.

Before BROWN, GOLDBERG and HIGGINBOTHAM, Circuit Judges.

HIGGINBOTHAM, Circuit Judge:

I.

This is an appeal from a denial without an evidentiary hearing of a state prisoner's habeas petition. Convicted of the murder of a two year-old child, petitioner brings to this court two errors assertedly of constitutional dimension. Finding merit, we reverse.

An autopsy of two year-old April Dawn Peters found extensive bruising over virtually her entire body. She had suffered a y-shaped fracture to her skull. Her heart, liver, spleen and pancreas had been severely torn. Either the

head or abdominal injuries would have caused death; the fracture occurred about one hour before the abdominal injuries. The bruises were less than twenty-four hours old.

Larry Plunkett, who lived with April's mother from time to time, was with April when she died. He explained that he had heard a thump and found April lying in the bedroom with her feet on the bed and her head on the carpeted floor. He described his extensive efforts to resuscitate, including direct heart massage, accomplished by forceful application of the hands to the chestwall. He did not explain the lapse of one hour from the time of the head injury to the suffering of abdominal injury.

A Palo Pinto grand jury indicted Plunkett, charging in two counts that

> [1] Larry Plunkett, on or about the 8th day of January, A.D. 1975, and before the presentment of this indictment, in said County and State, did then and there intentionally and knowingly cause the death of an individual, April Dawn Peters, by striking her with his hands;
>
> [2] And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present in and to said Court that on or about the 8th day of January, A.D., 1975, in said county and state and anterior to the presentment of this indictment, Larry Plunkett did then and there recklessly cause the death of an individual, April Dawn Peters, by striking her with his hands;...

He was convicted upon Count 1 of murder and sentenced by the same jury to fifty years in prison. His conviction was affirmed by the Texas Court of Criminal Appeals. *Plunkett v. State*, 580 S.W.2d 815 (Tex.Cr.App.1979). The United States District Court, adopting the recommendations of a magistrate, denied Plunkett's federal habeas

petition without an evidentiary hearing. Here he contends that his conviction was unconstitutionally obtained for two reasons. First, he argues that the court's charge allowed the jury to convict for an offense not charged in the indictment. Second, he argues that he was deprived of a fair trial when the prosecutor argued the uncharged offense in closing the case.

The pertinent statutes provide:

(a) A person commits an offense if he:

> (1) intentionally or knowingly causes the death of an individual;
>
> (2) intends to cause serious bodily injury and commits an act clearly dangerous to human life that causes the death of an individual;...

Tex.Penal Code § 19.02. The trial judge in the opening paragraph of his five pages of charge told the jury:

> Our law provides that a person commits murder if he intentionally or knowingly causes the death of an individual, or intends to cause serious bodily injury and commits an act clearly dangerous to human life that causes the death of an individual.

The charge later stated:

> Now if you find and believe from the evidence beyond a reasonable doubt that on or about the 8th day of January, 1975, in Palo Pinto County, Texas, the defendant, Larry Plunkett, did intentionally or knowingly cause the death of an individual, April Dawn Peters, by striking her with his hands, as set forth in the indictment,

then you will find the defendant guilty of murder as charged in the indictment.

Unless you so find beyond a reasonable doubt, or if you have a reasonable doubt thereof, you will acquit the defendant and find him not guilty of murder and consider whether he is guilty of the lesser offense of involuntary manslaughter.

You are instructed that to be guilty of murder, a defendant must have acted intentionally or knowingly in causing the death of the deceased. He must have intentionally or knowingly caused the death, or he must have intended to cause serious bodily injury and have committed an act clearly dangerous to human life that caused the death of deceased. Unless defendant so acted intentionally or knowlingly or with intent to cause serious bodily injury to the deceased, he cannot be convicted of murder.

Therefore, if you find from the evidence beyond a reasonable doubt that the defendant, Larry Plunkett, did cause the death of April Dawn Peters by striking her with his hands, but you have a reasonable doubt that the defendent did intentionally or knowingly cause death or that he intended to cause April Dawn Peters serious bodily injury, then you will acquit the defendant of murder, and will consider whether or not he is guilty of involuntary manslaughter.

Plunkett made no objection that the charge allowed the jury to convict for a violation of Tex.Penal Code § 19.02(a)(2). The Texas Court of Criminal Appeals applied its contemporaneous objection rule and confined its review to "fundamental error." 580 S.W.2d at 821. Reversing itself on its own motion for rehearing, it found that the charge did not allow the jury to convict on a non-

charged offense. In its view, while the charge was erroneous, there was no fundamental error. In affirming the conviction, the Court of Criminal Appeals conceded Plunkett's contention that allowing a conviction for an offense not charged in the indictment would be fundamental error under Texas law, but found that it did not occur.

The state court having reached the merits of Plunkett's challenge to the jury charge, there is no bar under *Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977), to its present review. Even if it could be argued that our standard of review is confined to that exercised by the Texas court, our review of claimed error in jury instructions by state judges is similar to that employed by the Court of Criminal Appeals in its inquiry into fundamental error. "An erroneous instruction will support a collatoral attack on the constitutional validity of a state court's judgment only if the ailing instruction so infected the entire trial that the resulting conviction violates due process." *Tyler v. Phelps*, 643 F.2d 1095, 1100 (5th Cir. 1981). It follows that the absence of objection has no impact in this case on our review.

II.

The Texas Court of Criminal Appeals in its review of the charge found:

> [T]he charge defined murder abstractly, and then applied this definition to the facts in Paragraph 3A. Although a theory not alleged in the indictment is included in Paragraph 3A, it is important to note that this paragraph is a converse charge, directing acquittal and consideration of the lesser included offense, not directing a finding of guilt. Thus, Paragraph 3A did not authorize a conviction under Sec. 19.02(a)(2), and provided no affirmative guidance for the jury's finding of guilt.

Id. at 822.

In *Sumner v. Mata*, 449 U.S. 539, 101 S.Ct. 764, 66 L.Ed.2d 722 (1981), the Supreme Court interpreted the requirements of 28 U.S.C. § 2254(d). The Court there noted that § 2254(d) drew no distinction between the factual determinations of a state trial court and those of a state appellate court when it referred to "a determination after a hearing on the merits of the factual issue." The Court stated:

> This is true particularly in a case such as this where a federal court makes its determination based on the identical record that was considered by the state appellate court and where there was no reason for the state trial court to consider the issue because respondent failed to raise the issue at that level.

Id. at 547, 101 S.Ct. at 769.

With the "presumption of correctness" as explicated in *Sumner v. Mata* in mind, we conclude that the Texas court's determination that the charge did not permit the jury to convict for a non-indicted offense is not supported by the record. With due deference to the Court of Criminal Appeals, we reach precisely the opposite result essentially because we consider a part of the record that it declined to consider. Our reading of the charge is guided by the Supreme Court. We pay "carefu attention to the words actually spoken..., for whether a defendant has been accorded his constitutional rights depends upon the way in which a reasonable juror could have interpreted the instruction." *Sandstrom v. Montana*, 442 U.S. 510, 514, 99 S.Ct. 2450, 2454, 61 L.Ed.2d 39 (1979). Finally, we are wary lest we fail to heed the interpretive rule that "a single instruction to the jury may not be judged in artificial isolation, but must be viewed in the context of the

overall charge." *Cupp v. Naughten*, 414 U.S. 141, 146-47, 94 S.Ct. 396, 400, 38 L.Ed.2d 368 (1973).

In its first opinion, the Texas Court of Criminal Appeals concluded that the jury instructions allowed Plunkett to be convicted for murder without a finding that he intentionally or knowingly caused the child's death but only intended to cause bodily harm. 580 S.W.2d at 817-18. On rehearing en banc, the court reached the opposite conclusion. In reversing itself, the Texas court substantially altered the scope of its analytical focus. The court looked only to the language of the charge and, while considering it to be ambiguous, found, aided by a parsing of the language, that the jury had been properly confined to intentional homicide. In narrowing its focus, the court put from view the closing arguement of the prosecutor. It did this by refusing to consider the prosecutor's argument because it was not objected to.

We part company with the Texas Court of Criminal Appeals at this point. The application of the Texas contemporaneous objection rule to the prosecutor's closing argument to the jury is unexceptionable. That claimed error is not before us. *Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594. It does not follow, however, that the argument of the prosecutor can be ignored in the consideration of Plunkett's main point, indisputably reserved for our review. Whether the jury was allowed to convict Plunkett for violating § 19.02(a)(2) when that offense was not charged must be decided in the context of the entire trial. Not only must the charge be read as a whole, but it must be laid in the courtroom scene with all the props and scenery that there existed. Had nothing else occured but the charge, conceded by the Texas court to have been ambiguous, we would be inclined to agree. The prosecutor told the jury, however:

> The first paragraph of the charge in this case defines murder. And there is primarily two defini-

tions of murder, a person commits murder if he intentionally and knowingly caused the death of an individual. That means I can plot, plan, lay and wait and shoot somebody, knowingly and intentionally shoot them, that's murder, or intends to cause serious bodily injury and commits an act clearly dangerous to human life that caused the death of an individual. That's the definition that applies to this case, doing an act clearly dangerous to health [sic] that results in death, and it's just most assuredly murder.

* * * * *

When Larry Plunkett was inflicting the injuries on this photograph to April Dawn Peters, when he was beating that girl, when he caused the skull fracture to her head, did he do something that caused her death? Did he do something that caused her death? That's murder, paragraph one, cause serious bodily injury and commit an act clearly dangerous to human life is murder just bigger than a goose. If it looks like a duck and walks like a duck and quacks like a duck, well, it's just a duck. Thank you, ladies and gentlemen.

With the court having given a charge which was at least subject to a construction that intent to cause serioud bodily injury was sufficient, the explicit explanation by the prosecutor to the jury, without intervention of the court, makes the conclusion inescapable. A reading of the entire record firmly supports the conclusion that the jury was allowed to convict upon the non-charged theory of murder.

We share the view of the dissent that we must be chary of simply reading the same record in a different way

than did the state court. We emphasize that our difference with the Texas Court of Criminal Appeals does not flow from a reading of the same record. Instead, the Texas court declined to consider a part of the trial record which we are persuaded must be considered. Indeed, the Texas Court of Criminal Appeals reached the same conclusion as this court when it considered the entire record. It was when it refused to consider the prosecutor's argument that the court concluded that the charge did not pemit the jury to convict of an offense not charged. The Supreme Court in *Cupp v. Naughten* counseled that claimed instructional error cannot be viewed in isolation. It emphasized that "...the process of instruction itself is but one of several components of the trial." *Id.*, 414 U.S. at 147, 94 S.Ct. at 400. We have declined to find fundamental error when there was no evidence to support an offense erroneously added by a jury charge. *See, e.g., United States v. Thetford*, 676 F.2d 170, 180 n. 17 (5th Cir. 1982). The claimed error is that the jury was allowed to convict Plunkett of a noncharged offense. We disagree with the Texas Court of Criminal Appeals' refusal to look beyond the ambiguous charge in answering this question.

III.

Having concluded that Plunkett was tried in a manner that allowed the jury to convict of a distinct crime that the state had not charged, we turn to the consequences of the error. We describe the standard of review, then return to the trial scene for its application.

As we have already noted, a state prisoner seeking federal habeas relief for erroneous jury instructions faces a heavy burden:

> '[I]t must be established not merely that the instruction [was] undesirable, erroneous, or even "universally condemned," but that it violated some right which was guaranteed to the defen-

> dant by the Fourteenth Amendment,' and that 'the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process.'

Washington v. Watkins, 655 F.2d 1346, 1369 (5th Cir. 1981), *cert. denied*, 456 U.S. 949, 102 S.Ct. 2021, 72 L.Ed.2d 474 (1982).

The constitutional right implicated here is basic:

> No principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge,...are among the constitutional rights of every accused...

Cole v. Arkansas, 333 U.S. 196, 201, 68 S.Ct. 514, 517, 92 L.Ed. 644 (1948). Denial of this right has driven federal habeas relief in numerous cases. *See, e.g., Tarpley v. Estelle*, 703 F.2d 157 (5th Cir. 1983); *Gray v. Raines*, 662 F.2d 569 (9th Cir.1981); *Watson v. Jago*, 558 F.2d 330 (6th Cir. 1977).

The state suggests that we should conclude that this jury could not have convicted Plunkett of the non-charged offense of murder under §19.02(a)(2), given his defense. This is a proper inquiry. The legal issues posed by convictions for non-charged offenses may be addressed in terms of a variance between indictment and proof. In this context, we have refused proffered error on direct review of a federal prosecution for the reason that "in the absence of evidence upon which the jury might have convicted on a ground not contained in the indictment, the defendant's conviction shall not be reviewed. In the absence of such evidence, the court's inadvertent addition of the instruction contained in the charge is 'trivial...'" *United States v. Thetford*, 676 F.2d 170, 180 n. 17 (5th Cir.1982), *cert. denied*, _____U.S._____, 103 S.Ct. 790, 74 L.Ed.2d

996 (1983). Our approach here is a specific application of the *Sandstrom* teaching that the question is whether a reasonable juror *could* have so concluded. 442 U.S. at 517, 99 S.Ct. at 2455. Where there is no evidence of the non-charged offense, or variance, one is a long way in his answer to the *Sandstrom* inquiry.

Plunkett denied that he had used any force on the child with any intent to injure. While he admitted that in his efforts to resuscitate he might have used greater force than he should have, his explanation for other severe injuries to the child, such as the blow to her head, was a fall from a bed. Yet although Plunkett's defense involved no concession of any blow with intent to injure but not to kill, a reasonable juror could still have found the former but not the latter state of mind. Specifically, the jurors may not have been persuaded that Plunkett ever intended to actually kill the child but may have decided that he did intend to inflict a serious bodily injury by an act clearly dangerous to her life. In sum, we face a case whether the charge read with the jury argument and the evidence at trial are such that a reasonable juror could have convicted Plunkett of a distinct crime with which he was not charged.

So far we have described no more than a risk of conviction not contained in an indictment. Plunkett had no constituional right to a state indictment. His consitutional right is the Sixth Amendment right "to be informed of the nature and cause of the accusation ..." *Spinkellink v. Wainwright*, 578 F.2d 582, 609 n. 32 (5th cir. 1978), *cert. denied, 440 U.S. 976, 99 S.Ct. 1548, 59 L.Ed.2d 796 (1979).*

The state does not argue and nothing in the record supports a reasonable conclusion that Plunkett was ever aware he might be convicted not of intentionally killing the child, but of intending to injure her by a blow that caused her death. The indictment read with an understanding of Texas law gave precisely the opposite notice.

Under Texas law, § 19.02(a)(1) and § 19.02(a)(2) are distinct and separate crimes. Under § (a)(1), the state had to prove that Plunkett intended to kill; § (a)(2) "plainly dispense[s] with the requirement that the actor *intend* the resulting death.... This is a significant and obvious distinction between § 19.02(a)(2) and § 19.02(a)(1), the 'intentional' murder statute." *Lugo-Lugo v. State*, 650 S.W.2d 72 at 88 (Tex.Cr.App. 1983)(opinion on rehearing en banc)(Clinton, J., concurring).

Finally, we note that the differences between the two types of murder were peculiarly in tension under these facts. It takes little imagination to see the decisional calculus of a reasonable juror confronted with Plunkett's defense that he may have injured the child but did not intend to do so and with a charge permitting conviction if Plunkett intended serious injury even if he did not intend death. The state indicted Plunkett for intending the death. It was not entitled to a fall-back offense if it failed to convince that death was subjectively intended. It is not a sporting theory of justice we describe. More is at stake than an ill-played card. The difference between these offenses obviously would effect the defensive preparation. It is basic notice which was denied. We cannot find that denial to have been harmless. The denial was unconstitutional and prejudiced the defendant. The writ must issue. The denial of the petition for habeas corpus is reversed. The case is remanded with instruction that the district court set a reasonable time within which Texas may try Plunkett again.

REVERSED AND REMANDED.

JOHN R. BROWN, Circuit Judge, dissenting:

I respecfully dissent. The majority recites but then ignores the recent teachings of the United States Supreme Court. It repudiates the carefully considered findings of the Texas Court of Criminal Appeals and impermissibly

substitutes its own judgment for that of the state court. This unacceptable approach leads the majority to the wrong result.

Clearly, a jury could find beyond a reasonable doubt that the indictment fairly described Plunkett's brutal crime. It is undisputed that the indictment was constitutionally adequate. The sole issue is whether the court's charge to the jury was fundamental error. The Texas Court of Criminal Appeals found that it was not. This determination deserves for more than the insubstantial degerence shown it by the panel majority.

In *Sumner v. Mata*, 449 U.S. 539, 101 S.Ct. 764, 66 L.Ed.2d 722 (1981) the Supreme Court ruled that a state court's factual determinations must be accorded a "presumption of correctness" under 42 U.S.C. § 2254(d). As the Court recently stated in *Marshall v. Lonberger*, _____U.S._____, _____, 103 S.Ct. 843, 850, 74 L.Ed.2d 646, 657 (1983), *Sumner* calls for a "'high measure of deference'" and "requires that a federal habeas court more than simply disagree with the state court before rejecting its factual determinations. Instead, it must conclude that the state court's findings lacked even 'fair[] support' in the record."

The Supreme Court's decision in *Maggio v. Fulford*, _____U.S._____, 103 S.Ct. 2261, 75 L.Ed.2d _____ (1983), is a fresh reminder that the Courts of Appeals are not free to second-guess determinations made by state courts. In that case, this Court had reversed the district court and granted habeas relief to a petitioner who claimed he was mentally incompentent to have stood trial. *Fulford v. Maggio*, 692 F.2d 354 (5th Cir. 1982). The issue had earlier been raised before the trial court, which had found the defendant competent. The Louisiana Supreme Court upheld that finding on appeal. Summarily reversing this Court's decision, the Supreme Court had "not the slightest hesitation in saying that the trial court's con-

clusion as to Fulford's competency was 'fairly supported by the record.'" _____U.S. at_____, 103 S.Ct. at 2264, 75 L.Ed.2d at _____.

In its decision on rehearing in this case, the Court of Criminal Appeals pointed out that the portion of the instructions which referred to the non-indicated crime were phrased in such a way as to direct acquittal, and consideration of the lesser offense of manslaughter, if the jury did not find certain facts beyond a reasonable doubt. Because the jury was instructed to return a verdict of guilty only if they found that Plunkett did "intentionally or knowingly cause the death" of the victim, the instruction did not authorize the jury to return a guilty verdict on the nonindicted offense.

> [T]he charge defnined murder abstractly, and then applied this definition to the facts in Paragraph 3A. Although a theory not alleged in the indictment is included in Paragraph 3A, it is important to note that this paragraph is a converse charge, directing acquittal and consderation of the lesser included offense, not directing a finding of guilt. Thus, Paragraph 3A did not authorize a conviction under Sec. 19.02(a)(2), and provided no affirmative guidance for the jury's finding of guilt.

Plunkett v. State, 580 S.W.2d 815, 822 (Tex.Cr.App.1979).

The conclusion reached by the Court of Criminal Appeals is fairly supported by the actual language of the jury charge and by the record as a whole. Yet the majority chooses to give the record its own interpretation. By failing to accord a properly high measure of deference to the findings of the Court of Criminal Appeals, the majority overlooks the clear lesson of *Sumner, Lonberger,* and *Fulford.*

Even more so, I disagree with the majroity's contention that the prosecutor's closing argument elevated the otherwise acceptable jury instruction to the realm of fundamental error. Because of the absence of a contemporaneous objection, the propriety of the prosecutor's argument is not before this Court. The sole question—as the majority acknowledges—is whether the instruction itself, in the context of the circumstances of the trial, authorized a conviction on the unindicted offense. The majority acknowledges that at least arguably, the instruction alone did not authorize any such verdict. I cannot accept the majority's thesis that the court's constitutionally acceptable instruction was somehow turned into fundamental error by the prosecutor's remarks.

I find nothing in the Court of Criminal Appeals' *en banc* opinion to suggest that it would have reached a different result if only it had placed the jury charge in the context of the prosector's argument. That Court considered the language of the charge and concluded that it did not authorize conviction for a non-indicted offense. I would uphold that finding.

But more fundamentally, the constitutional acceptability of an errorless jury charge cannot by the words of an advocate be transmitted into a denial of due process by the Texas Courts.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

LARRY PLUNKETT	§	
	§	
V.	§	CIVIL ACTION NO.
	§	CA-4-80-203-K
W.J. ESTELLE, JR.,	§	
DIRECTOR, TEXAS	§	
DEPARTMENT OF	§	
CORRECTIONS	§	

FINDINGS, CONCLUSIONS AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE

Pursuant to the provisions of Title 28, United States Code, Section 636(b), and Miscellaneous Order No. 6 of the court in implemenation thereof filed in the Dallas Division on July 1, 1977, the subject cause has previously been referred to the United States Magistrate. The findings, conclusions and recommendation of the United States Magistrate, as evidenced by his signature thereto, are as follows:

FINDINGS AND CONCLUSIONS:

Type Case

This is a petition for writ of habeas corpus by a state inmate pursuant to Title 28, United States Code, Section 2254.

Parties

Petitioner Larry Plunkett is confined at the Wynne Unit of the Texas Department of Corrections at Huntsville, Texas.

Respondent is the Director of the Texas Department of Corrections.

History of the State Case

Petitioner was indicted for murder and manslaughter on March 3, 1976 in Cause No. 7268 in the 29th Judicial District Court, Palo Pinto County, Texas. On July 26, 1976, Petitioner, represented by retained counsel, entered a plea of not guilty. The jury found him guilty of murder and sentenced him to fifty years in the Texas Department of Corrections.

On November 15, 1978, the judgment was reversed by the Court of Criminal Appeals and the cause remanded on the grounds that the trial court committed fundamental error by charging the jury a theory not alleged in the indictment.

On November 29, 1978, the Texas Court of Criminal Appeals on its own motion set the cause on rehearing. On May 16, 1979, the court sitting en banc granted the motion for rehearing and affirmed the judgment. *Plunkett v. State*, 580 S.W.2d 815 (Tex.Crim.App. 1979).

Pleadings Submitted

Petitioner, represented by counsel, submitted a three-page typewritten petition for writ of habeas corpus on July 7, 1980.

An Order Specifying Further Action to Be Taken by the Clerk and an Order to Show Cause were entered on July 8, 1980.

Respondent's Motion to Dismiss, Original Answer and Brief was filed on August 13, 1980.

Issues Presented

Petitioner presents the following grounds for relief:

> The petitioner was deprived of due process of law when the trial court instructed the jury on a theory of prosecution not alleged in the indictment, the trial court deprived Petitioner of his right to be informed of the charges against him as guaranteed by the Sixth and Fourteenth Amendments of the Constitution of the United States of America and deprived him of the effective assistance of counsel by not apprising defense counsel of the charges against which they were being called upon to defend...
>
> The Petitioner was deprived of due process of law when the prosecuting attorney argued that the jury should convict on the theory not alleged in the indictment. Such a bad faith argument

was plain error and deprived Petitioner of a fair trial on the charges against him as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the Constitution of the United States of America.

The court understands Petitioner to raise four issues stemming from his contention that the jury was charged on a theory of murder not alleged in the indictment:

1. Erroneous jury charge constituted denial of due process;

2. Petitioner was denied the right to be informed of the nature of the charge;

3. Petitioner was denied effective assistance of counsel because they were not apprised of charge; and

4. Prosecutor's argument deprived Petitioner of due process.

First Issue: Erroneous jury charge constituted denial of due process

A brief account of the facts is necessary to place Petitioner's arguments in context. Petitioner was convicted for the beating death of two-year-old April Dawn Peters; at the time of the child's death Petitioner lived with her and her mother. The evidence shows that April had a fractured skull, internal injuries to her heart, liver, spleen and pancreas and thirty to forty bruises on her body. (S.F. 108-15). The Dallas County medical examineer testified that either the head injuries or the injuries to the internal organs would have been sufficient to cause death. (S.F. 127).

Petitioner testified that on the evening of April's death he was in the living room of their home when he heard

April fall out of her bed, hit her head on the floor and begin to choke. He stated that her internal injuries were the result of his attempts to resuscitate her. (S.F. 389). Several witnesses testified that April was badly bruised because she was a clumsy child who often fell. (S.F. 308, 324, 334). The medical examiner testified that small children may be injured through forceful resuscitation attempts. (S.F. 123). However, he stated that in his opinion all of the injuries could not have been caused in that way, that no food was found anywhere in the respiratory tract as would be expected if the child was choking and that the head injury happened thirty to forty-five minutes before the injuries to the abdomen. (S.F. 121-126).

All of Petitioner's claims stem from his assertion that the trial court instructed the jury on a theory of prosecution not alleged in the indictment. The jury was charged on two separate theories of murder. V.T.C.A. Penal Code §19.02, which defines the offense of murder, provides in relevant part:

> (a) A person commits an offense if he:
>
> > (1) intentionally or knowingly causes the death of an individual [or]
> >
> > (2) intends to cause serious bodily injury and commits an act clearly dangerous to human life that causes the death of an individual

The indictment charged that Petitioner did:

> ...intentionally and knowingly cause the death of an individual, April Dawn Peters, by striking her with his hands..."

in violation of §19.02(a)(1).

However, the charge defined murder in the abstract to include the method defined in §19.02(a)(2):

> Our law provides that a person commits murder if he intentionally or knowingly causes the death of an individual, or intends to cause serious bodily injury and commits an act clearly dangerous to human life that causes the death of an individual.

The charge applied the law to the facts as follows:

> Now if you find and believe from the evidence beyond a reasonable doubt that on or about the 8th day of January, 1975, in Palo Pinto County, Texas the defendant, Larry Plunkett, did intentionally or knowingly cause the death of an individual, April Dawn Peters, by striking her with his hands, as set forth in the indictment, then you will find the defendant guilty of murder as charged in the indictment.
>
> Unless you so find beyond a reasonable doubt, or if you have a reasonable doubt thereof, you will acquit the defendant and find him not guilty of murder and consider whether he is guilty of the lesser offense of involuntary manslaughter.
>
> "You are instructed that to be guilty of murder, a defendant must have acted intentionally or knowingly in causing the death of the deceased. He must have intentionally or knowingly caused the death, *or he must have intended to cause serious bodily injury and have committed an act clearly dangerous to human life that caused the death of deceased.* Unless defendant so acted intentionally or knowingly *or with intent to cause serious bodily injury to the deceased,* he cannot be convicted of murder.
>
> Therefore, if you find from the evidence beyond a reasonable doubt that the defendant, Larry Plunkett,

did cause the death of April Dawn Peters by striking her with his hands, but you have a reasonable doubt that the defendant did intentionally or knowingly cause death *or that he intended to cause April Dawn Peters serious bodily injury,* then you will acquit the defendant of murder, and will consider whether or not he is guilty of involuntary manslaughter.

(Emphasis added).

On appeal the Court of Criminal Appeals found the charge to the jury on a theory not alleged in the indictment to be fundamental error. The court found that the error was compounded by the prosecutor's jury argument:

"The first paragraph of the charge in this case defines murder. And there is primarily two definitions of murder, a person commits murder if he intentionally and knowingly causes the death of an individual. That means I can plot, plan, lay and wait and shoot somebody, knowingly and intentionally shoot them, that's murder, or intends to cause serious bodily injury and commits and act clearly dangerous to human life that caused the death of an individual. That's the definitions that applies to this case, doing an act clearly dangerous to health [sic] that results in death, and it's just most assuredly murder."

. . .

"When Larry Plunkett was inflicting the injuries on this photograph to April Dawn Peters, when he was beating that girl, when he caused the skull fracture to her head, did he do something that caused her death? Did he do something that caused her death? That's murder, paragraph one, cause serious bodily injury and commit an act clearly dangerous to human life is murder just bigger thatn a goose. If it looks like a duck and walks like a duck and quacks like a duck, well it's just a duck. Thank you, ladies and gentlemen."

> (The "paragraph one" referred to by the prosecutor is the abstract statement of the law of murder and tracks Sec. 19.02(a)(1) and (2)).

However, on May 16, 1979, the court sitting en banc on its own motion for rehearing affirmed the conviction. The court found that Petitioner made no objection to the contested portion of the charge at trial, and thus limited its review to fundamental error. (See S.F. 475). The court noted:

> Although the charge is erroneous and confusing, it does not authorize conviction on a theory not alleged in the indictment. The inclusion of the erroneous language in the charge did not enable the jury to return a guilty verdict if they found murder had been committed in any other way than that charged in the indictment. The jury was instructed to return a finding of guilt only if they found that the appellant did "intentionally or knowingly cause the death of an individual, April Dawn Peters, by striking her with his hands." We find no fundamental error in the jury charge...

Plunkett v. State, supra at 823.

Before a federal court can grant relief under Section 2254 based on an alleged error in a state trial court's unobjected to charge the error must be so flagrant as to rise to the level of a constitutional violation or so prejudicial as to render the trial itself fundamentally unfair. *Alvarez v. Estelle,* 531 F.2d 1319, 1322 (5th Cir. 1976).

The Supreme Court in *Henderson v. Kibbe,* 431 U.S. 145, 154-55 (1977) stated that a prisoner seeking federal habeas relief has a heavy burden in challenging the court's jury charge:

The burden of demonstrating that an erroneous instruction was so prejudicial that it will support a collateral attack on the constitutional validity of a state court's judgment is even greater than the showing required to establish plain error on direct appeal.[13] The question in such a collateral proceeding is "whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process," *Cupp v. Naughton*, 414 U.S., at 147, not merely whether "the instruction is undesirable, erroneous, or even 'universally condemned,'" *id.* at 146.

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13. The strong interest in preserving the finality of judgments, see *e.g. Blackledge v. Allison*, *ante*, p. 83 (POWELL, J., concurring); *Schneckloth v. Bustamonte*, 412 U.S. 218, 256-266 (POWELL, JR., concurring), as well as the interest in orderly trial procedure, must be overcome before collateral relief can be justified. For a collateral attack may be made many years after the conviction when it may be impossible, as a practical matter, to conduct a retrial.

As the Court of Criminal Appeals noted on rehearing, the charge is clearly erroneous. Petitioner was charged with causing April's death "intentionally and knowingly" in violation of §19.02(a)(1); however, murder was defined in paragraph 1 to include causing death through commission of a clearly dangerous act with the intent to cause serious bodily injury and the §19.02(a)(2) definition was applied to the facts in paragraph 3A.

On rehearing the Court of Criminal Appeals noted that paragraph 3A was a converse charge which directed the jury to acquit petitioner unless they found that he intended to cause death or serious bodily injury, In affirming the conviction the court reasoned that the jury was

directed to reach a guilty verdict only if they found beyond a reasonable doubt that Petitioner knowingly caused the child's death. The court found no fundamental error because the jury was not authorized to convict on a theory not alleged in the indictment. Given the prosecutor's own apparent misinterpretation of the charge and his subsequent jury argument requesting a finding of guilty for a violation of either section (a)(1) or (a)(2) and defense counsel's failure to object either to the charge or to the argument, it is to be doubted whether such a distinction was made by the jury.

However, as noted by the Supreme Court, the standard for this court to apply is not merely whether "the instruction is undesirable, erroneous, or even 'universally condemned,'" but whether the instruction by itself so infected the entire trial that the resulting conviction violates due process. Even without accepting the Court of Criminal Appeals finding that the jury was directed to convict Petitioner only upon a finding that he knowingly and intentionally caused the child's death in violation of §19.02(a)(1), Petitioner has not demonstrated the necessary prejudice to warrant habeas relief. The intent to kill, which is the only difference between (a)(1) and (a)(2), was not an important issue in this case. There is no evidence that Petitioner intended merely to cause serious bodily injury short of death. Petitioner's testimony, if accepted as true, negated any intent to harm the child. The jury, for example, was not erroneously instructed that Petitioner could be convicted for negligently or recklessly inflicting the injuries in his resuscitation attempts. The charge, although a misstatement of the law, was not so prejudicial that the conviction violates due process.

It is recommended that relief be denied on this issue.

Second Issue: Petitioner was denied the right to be informed of the nature of the charge

Petitioner claims that he was not adequately advised of the charges against him because the jury was erroneously instructed on a theory of murder not charged in the indictment. Petitioner clearly was indicated only for intentionally and knowingly causing the death of April Dawn Peters, in violationg of §19.02(a)(1). Although counsel could successfully have objected to those portions of the charge containing the elements of §19.02(a)(2), as decided herein the charge was not so prejudicial as to result in a denial of due process.

It is recommended that relief be denied on this issue.

Third Issue: Petitioner was denied effective assistance of counsel because they were not apprised of the charge

Petitioner's third issue is closely related to his second issue. Again, this argument is without merit. Petitioner was indicted only under §19.02(a)(1). The erroneous jury charge came only after all evidence was presented. Counsel had the opportunity to make a specific objection to the charge and failed to do so.

It is recommended that relief be denied on this issue.

Fourth Issue: Prosecutor;s argument deprived Petitioner of due process

Petitioner argues that the prosecutor's closing argument in which he urged the jury to convict on a theory of murder not alleged in the indictment was in bad faith and deprived Petitioner of a fair trial. (S.F. 481, 555-56). The portion of the argument objected to is set out in the discussion of the first issue. The defense did not object to the argument.

The scope of review of prosecutorial comment in a Section 2254 proceeding is a narrow one. Not every trial error which might merit relief on direct appeal constitutes

a denial of due process necessary to warrant relief. *Donnelly v. DeChristoforo,* 416 U.S. 637, 642-43, 648 (n.5)(1974). *Donnelly* states that more than undesirability or even 'universal condemnation' must be shown. Unless a specific consitutional guarantee is involved, it must be shown that the remarks were so prejudicial that they rendered the trial fundamenally unfair. *Cobb v. Wainwright,* 609 F.2d 754 (5th Cir. 1980).

The prosecutor's comments were an incorrect statement of the law as applied to Petitioner's case. However, it appears that none of the attorneys involved were aware at the time of trial that the charge was incorrect. The comments were a restatement of the court's charge, to which the defense had failed to object. No bad faith appears involved, nor has Petitioner shown prejudice amounting to a denial of due process. This is not a case, for example, where the prosecutor attempted to mislead the jury by alluding to nonexistent evidence. See *Houston v. Estelle,* 569 F.2d 327, (5th Cir. 1978). The remarks reflected merely a misunderstanding of the law which apparently was shared by opposing counsel. Petitioner's trial was not rendered fundamentally unfair by the comments.

It is recommended relief should be denied on this issue.

RECOMMENDATION:

It is recommended that this petition for writ of habeas corpus be denied because

1. The jury charge, although erroneous, was not so prejudicial that Petitioner's trial was fundamentally unfair;

2. Petitioner was not denied the right to be informed of the nature of the charges against him;

3. Petitioner was not denied effective assistance of counsel because of the erroneous charge; and

4. The prosecutor's comments were not so prejudicial that Petitioner's trial was rendered fundamentally unfair.

SIGNED this 17th day of September, 1981.

/s/

UNITED STATES MAGISTRATE

APPENDIX D

Larry PLUNKETT, Appellant,

v.

The STATE of Texas, Appellee.

No. 55078

Court of Criminal Appeals of Texas.

Nov. 15, 1978.

On Rehearing May 16, 1979.

OPINION

ODOM, Judge.

This is an appeal from a conviction for murder in which the jury assessed punishment at fifty years.

It is only necessary to discuss one of appellant's grounds of error. In his third ground of error appellant contends the court erroneously charged the jury on the offense alleged.

The indictment in relevant part alleges that appellant did:

"...intentionally and knowingly cause the death of an individual, April Dawn Peters, by striking her with his hands..."

V.T.C.A., Penal Code Sec. 19.02, which defines the offense of murder, in relevant part provides:

"(a) A person commits an offense if he:

(1) intentionally or knowingly causes the death of an individual; [or]

(2) intends to cause serious bodily injury and commits an act clearly dangerous to human life that causes the death of an individual;..."

Appellant was clearly charged under Sec. 19.02(a)(1), yet the trial court, in submitting the case to the jury, allowed them to find appellant guilty under either Sec. 19.02(a)(1) or Sec. 19.02(a)(2). Although the court first correctly applied the law to the facts of the case under the theory alleged in the indictment, it then immediately thereafter included this paragraph in its instructions to the jury:

> "You are instructed that to be guilty of murder, a defendant must have acted intentionally or knowingly in causing the death of the deceased. He must have intentionally or knowingly caused the death, *or he must have intended to cause serious bodily injury and have committed an act clearly dangerous to human life that caused the death of the deceased.* Unless defendant so acted intentionally or knowingly *or with intent to cause serious bodily injury to the deceased,* he cannot be convicted of murder.
>
> "Therefore, if you find from the evidence beyond a reasonable doubt that the defendant, Larry Plunkett, did cause the death of April Dawn Peters by striking her with his hands, but you have a reasonable doubt that the defendant did intentionally or knowingly cause death *or that he intended to cause April Dawn Peters serious bodily injury,* then you will acquit the defendant of murder, and will consider whether or not he is guilty of involuntary manslaughter."

We find the jury charge on a theory not alleged in the indictment was fundamental error requiring a new trial, and sustain appellant's third ground of error. In *Morter v. State*, Tex.Cr.App., 551 S.W.2d 715;, the defendat was convicted of injury to a child on an indictment that alleged he had caused serious bodily injury. On appeal the conviction was reversed because the jury instructions authorized conviction if the evidence showed the defendant had caused serious physical deficiency or impairment, or deformity, which were means not alleged in the indictment. Robbery convictions were reversed for fundamentally defective jury charges authorizing convictions on theories not alleged in the indictments in *Robinson v. State*, Tex.Cr.App., 553 S.W.2d 371; *Davis v. State*, Tex.Cr.App., 557 S.W.2d 303; *Jones v. State*, Tex.Cr.App., 566 S.W.2d 939, and *Edmond v. State*, Tex.Cr.App., 566 S.W.2d 609. In *Gooden v. State*, 140 Tex.Cr.R. 347, 145 S.W.2d 177, a conviction for burglary with intent to commit theft was reversed for fundamental error in the jury charge because it authorized a conviction for burglary with intent to commit a felony or theft even though no intent to commit a felony had been alleged in the indictment.

In this case the indictment alleged murder by intentionally or knowingly causing the deceased's death, but the jury charge expanded on those allegations and authorized a convition if appellant intended to cause serious bodily injury and committed an act clearly dangerious to human life that caused the deceased's death. This was fundamental error[1] and the conviction must be set aside.

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1. In this case the error was compounded by the prosecutor's jury argument at the guilt stage of the trial which emphasized this theory for conviction. In opening his argument the prosecutor said:

> "The first paragraph of the charge in this case defines murder. And there is primarily two definitions of murder,

(footnote continued on following page)

The judgment is reversed and the cause remanded.

Before the court en banc.

OPINION ON COURT'S OWN MOTION FOR REHEARING

TOM G. DAVIS, Judge.

Appeal is taken from a conviction for murder. V.T.C.A. Penal Code, Sec. 19.02. Punishment was assessed by the jury at fifty years.

(footnote continued from previous page)

> a person commits murder if he intentionally and knowingly causes the death of an individual. That means I can plot, plan, lay and wait and shoot somebody, knowingly and intentionally shoot them, that's murder, or intends to cause serious bodily injury and commits an act clearly dangerous to human life that caused the death of an individual. That's the definition that applies to this case, doing an act clearly dangerous to health [sic] that results in death, and it's just most assuredly murder."

Later, in concluding his jury argument at the guilt stage, the prosecutor again urged this theory of conviction:

> "When Larry Plunkett was inflicting the injuries on this photograph to April Dawn Peters, when he was beating that girl, when he caused the skull fracture to her head, did he do something that caused her death? Did he do something that caused her death? That's murder, paragraph one, cause serious bodily injury and commit an act clearly dangerous to human life is murder just bigger than a goose. It it looks like a duck and walks like a duck and quacks like a duck, well, it's just a duck. Thank you, ladies and gentlemen."

(The "paragraph one" referred to by the prosecutor is the abstract statement of the law of murder and tracks Sec. 19.02(a)(1) and (2)).

Appellant initially challenges the sufficiency of the evidence to support the conviction.

The record reflects that April Dawn Peters, age two, died on January 7, 1975, at her home in Mineral Wells. Appellant lived with the child's mother at the time of the death of the deceased.

Dr. Charles Petty, Chief Medical Examiner for Dallas County, testified as to the cause of death of the child. His testimony was based on the results of an autopsy performed by Dr. Ross Zumwalt on January 8, 1975.

Dr. Petty testified that there were thirty to forty bruises on the body of the deceased. These bruises were from three-eights of an inch to an inch at their greatest dimension. The bruises were found on the left forehead, both sides of the face, the chest, the abdomen, the back, the front surfaces of both thighs and lower legs, and the inner surface of one thigh. The bruises found on the buttocks were larger than the others and flowed together. Dr. Petty identified State's Exhibit No. 1 as a picture of the deceased depicting the bruises to her face and chest.

The inner surface of the scalp covering the left side of the back of the head was also bruised, and under it was a corresponding fracture of the skull. The fracture was described as "Y" shaped and three inches long at its greatest length. The depth of the fracture was the entire thickness of the skull. The witness observed that the edges of the fracture were not bent inward or depressed, indicating contact with a broad flat object rather than a narrow, more pointed object. The brain was described as swollen.

The autopsy revealed other internal injuries to the trunk of the body. The heart had a tear on its back portion. The sac surrounding the heart contained a considerable amount of blood. The liver, the spleen, and the pancreas

had also been torn. There were tears in the tissue that holds the intestines in place, and blood was present in both the chest and abdominal cavities. In the doctor's opinion, each of the above injuries was caused by forece either directly applied or indirectly applied, such as a blow or an impact with a fixed object.

When asked whether the internal injuries could have been the result of resuscitation or heart massage attempts, the witness stated that the injuries could have resulted from such actions. In his opinion, however, they were not caused by resuscitative measures. The doctor stated that a great or heavy force would be necessary to cause the injuries to the internal organs that the autopsy revealed. He further stated that no food material or vomitus was found anywhere in the respiratory track, as would be expected if a person had been choking on such material so as to require resuscitation.

Dr. Petty testified that the injury to the head was received approximately an hour before death. He further estimated that the head injury was "somewhat older than the injuries to the abdomen, thirty minutes, perhaps forty-five." An examination of some of the bruises revealed that they were received sometime within 24 hours of death.

The witness concluded that either the injuries to the head or the injuries to the internal organs would have been sufficient to cause the death independently of each other. He stated that in his opinion the injuries to the head were not those normally received when a child falls from an ordinary bed onto a carpeted floor.

Larry Watson, a Mineral Wells police officer, testified in regard to his investigation of the incident. Watson identified State's Exhibits Nos. 2-7 as pictures of the deceased taken at the hospital. These pictures depict the bruises covering the deceased's body as described above.

Gerald Seaman, an ambulance attendant, testified that he attempted to resuscitate the deceased. He found the airway was not blocked and that he was able to get air into the child's lungs. He also attempted to resuscitate the child's heart by external means, but was unsuccessful, Seaman also stated that he applied a suction apparatus to the airways of the victim and that a fluid containing food particles was removed by this method.

Gayle Peters, the mother of the deceased, testified that she left the child in the appellant's care about 6:00 p.m. on the day of the child's death. According to her testimony, earlier that day she had bathed the girl and noticed bruised on her buttocks and stomach only. Peters stated that the bruises on the buttockds were from a spanking administered by the appellant on the previous day. She further stated that when she left the house at 6:00 p.m. the child had no other bruises and seemed to be acting normally. Peters viewed State's Exhibit No. 1 and stated that the bruises depicted in that photo were not present when she last saw the child alive.

Cross-examination revealed that Peters had previously made a statement to police that conflicted with her testimony at trial. In that statement she recounted other injuries sustained by the child in the two weeks before her death. The extent and cause of these injuries mentioned in her statement were testified to in detail by defense witnesses and are set forth in this opinion. Letters written to the appellant by the witnesses were also somewhat inconsistent with her testimony at trial..

Sherrill Rogers testified that she accompanied Gayle Peters on the day of the child's death. She stated that at 6:00 p.m. when she and Peters left the house the child seemed normal. She related that when she returned to the appellant's home with Peters one hour later the ambulance had arrived and was about to transport the child to the hospital.

Appellant's defense was based on showing that the bruises and head injuries were accidental and that the internal injuries were unintentionally inflicted during attempts to revive her.

Randy Fouts testified that the child was easy to bruise and very clumsy. He further testified that the bruises on her forehead were caused by a falling lamp around December 17, 1974. He stated that some four days after that incident the child tripped and injured the same part of her head. He concluded that the bruises covering her body were the result of bumping into things and accidentally hurting herself.

Appellant's mother testified that the child was awkward and easy to bruise, and that she had observed the child fall and hit her head on a coffee table in late November. She further stated that other bruises were from the child's mishaps while riding her tricycle.

Robin Fouts testified regarding the lamp incident and the resulting injury to the child.

Appellant's father testified that he had observed the child fall against the coffee table. He stated that the child was somewhat awkward and that he had observed bruises on the child's legs and on her head around Christmas, 1974.

Sherrill Rogers' husband, Arthur, testified that he had observed bruises on the child on previous occasions. He stated that three days previous to the child's death he had seen her fall backwards from a couch onto a concrete floor covered only by a thin carpet with no padding underneath it.

Appellant testified that he had never injured the child intentionally. According to his testimony, he was in the living room of his home when he heard a loud thump and

choking sounds. He ran to the bedroom to find the child lying with her feet on the bed and her head on the floor. He stated that he attempted to resuscitate the child, and in his excitement may have used too much force on her chest and stomach. According to his testimony, he pushed on the child's stomach and hit her on the chest to attempt to revive her. He took the child to a neighbor's house, and help was summoned.

He admitted to have disciplined the child on previous occasions, but claimed he never injured the child. He denied any intentional injury of the child on the night of her death.

State's rebuttal witness Ima Moreland testified as to the condition of the child on the days between Christmas and the first of January. Mrs. Moreland is the mother of the deceased's natural father.

Moreland testified that the child was in her custody from December 18th to the 22nd, on December 26th, and again on December 29th and 30th. She stated that she had taken the child to the doctor during the first of the periods set out above for treatment of burns to her hands. She related that during this Christmas period she bathed, dressed, and cared for the child, and observed no bruises.

Moreland identified State's Exhibits 8 through 13 as photographs taken on Christmas morning depicting the child while at Moreland's home. She also identified State's Exhibits Nos. 14 and 15 as pictures of the child taken on December 29th. These pictures reveal no bruises on the child's forehead.

Moreland did state that on December 29th she noticed a bruise on her shin, a small bruise close to the corner of one eye, and small bruises on her chest and on one arm. Moreland was then shown State's Exhibits Nos. 1 and

2, pictures of the deceased after her death. Moreland stated that the bruises depicted in those photos were more numerous, serious, and in additional locations from the ones she had observed.

Debbie Clifton, Mrs. Moreland's daughter, testified that she observed the child on the occasions that the child was at Moreland's home, she stated that the child had no bruise on her forehead at those times.

Appellant's sister, Ima Plunkett, testified as a rebuttal witness for the defense. She testified that the pictures of the child, State's Exhibit Nos. 8-15, revealed bruises on her lip, forehead, and shoulder when viewed under a magnifying glass. She further stated that the bruises on the inside of the deceased's legs were caused by riding a rocking horse.

Appellant maintains that the evidence is insufficient to support the conviction. He specifically challenges the sufficiency of the evidence to show that he intentionally and knowingly caused the death, and to show that the death was caused by blows from his hands.

Appellant's conviction is based on circumstantial evidence. Circumstantial evidence must exclude every other reasonable hypothesis except the guilt of the accused. *Easley v. State,* Tex.Cr.App., 564 S.W.2d 742; *Stogsdill v. State,* Tex.Cr.App., 552 S.W.2d 481;. Each fact need not point directly and independently to the guilt of the accused, however, as the cumulative effect of all the incriminating facts may be sufficient to support the conviction. *Easley v. State,* supra; *Stogsdill v. State,* supra; *Flores v. States,* Tex.Cr.App., 551 S.W.2d 364;.

The evidence reveals that the appellant was with the child when she was fatally injured. The testimony at trial regarding the severity of the injuries reflects intentional acts rather than any accident or unintentional injury. The

bruises depicted in the pictures strongly indicate blows to almost every portion of the body. The locations of the bruises in many instances militate against any conclusion that they were accidental.

Piece by piece the State's case eliminated the explanations of these injuries offered by appellant. Appellant's testimony that he heard a thud and immediately went to the child's aid is in direct conflict with the evidence that the blow to the head was inflicted approximately an hour before the child's death. The evidence that the bruises and possibly the skull fracture were caused by accidents at various times previous to the date of her death is contradicted by the pictures of the child between Christmas and January 1st and the observations of the actions of the child during that time.

We find that the cumulative force of the evidence was sufficient to exclude every reasonable hypothesis but one, the appellant's guilt.

Appellant contends that the trial court erred in its charge to the jury. The basis of this contention is that the trial court charged on a theory of murder not alleged in the indictment. Appellant made no objection to this portion of the charge at trial, thus our review is limited to fundamental error.

The indictment alleged that the appellant:

"did then and there intentionally and knowingly cause the death of an individual, April Dawn Peters, by striking her with his hands;..."

This constitutes an offense under Sec. 19.02(a)(1), supra.[1] The court's charge to the jury included another mode of committing murder, however, and thus charged on a theory not alleged in the indictment.

The court's charge defined murder abstractly to include the second possible mode of committing murder contained in Sec. 19.02(a)(2). In the following paragraphs, the charge applied the law to the facts as follows:

"3.

"Now if you find and believe from the evidence beyond a reasonable doubt that on or about the 8th day of January, 1975, in Palo Pinto County, Texas, the defendant, Larry Plunkett, did intentionally or knowingly cause the death of an individual, April Dawn Peters, by striking her with his hands, as set forth in the indictment, then you you will find the defendant guilty of murder as charged in the indictment.

"Unless you so find beyond a reasonable doubt, or if you have a reasonable doubt thereof, you will acquit the defendant and find him not guilty of murder and consider whether he is guilty of the lesser offense of involuntary manslaughter.

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1. V.T.C.A. Penal Code, Sec. 19.02, as relevant to this discussion, provides:

"(a) A person commits an offense if he:

"(1) intentionally or knowingly causes the death of an individual;

"(2) intends to cause serious bodily injury and commits an act clearly dangerous to human life that causes the death of an individual;

"3A.

"You are instructed that to be guilty of murder, a defendant must have acted intentionally or knowingly in causing the death of the deceased. He must have intentionally or knowingly caused the death, *or he must have intended to cause serious bodily injury and have committed an act clearly dangerous to human life* that caused the death of deceased. *Unless* defendant so acted intentionally or knowingly or with intent to cause serious bodily injury to the deceased, *he cannot* be convicted of murder.

"Therefore, if you find from the evidence beyond a reasonable doubt that the defendant, Larry Plunkett, did cause the death of April Dawn Peters by striking her with his hands, *but you have a reasonable doubt* that the defendant did intentionally or knowingly cause death or *that he intended to cause April Dawn Peters serious bodily injury,* then you *will acquit* the defendant of murder, and will consider whether or not he is guilty of involuntary manslaughter." [Emphasis added.]

This Court has held that when a jury charge includes a theory not alleged in the indictment in its application of the law to the facts, the charge is fundamentally defective. *McGee v. State,* Tex.Cr.App., 575 S.W.2d 563; *Cleland v. State,* Tex.Cr.App., 575 S.W.2d 296.[2] Such a

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2. In each of the following cases the theory not alleged in the indictment was included in the affirmative application of the law to the facts. Thus, the jury's consideration was centered on a finding of guilt if it found facts to exist to support the theory not alleged in the indictment. *Smith v. State,* Tex.Cr.App., 574 S.W.2d 551; *Bridges v. State,* Tex.Cr.App., 574 S.W.2d 143; *Garcia v. State,*

(footnote continued on following page)

charge is in error because it *authorizes* a conviction on a theory not alleged in the indictment, not just because surplus language has been included in the charge. *See Robinson v. State*, Tex.Cr.App., 553 S.W.2d 371, and *compare Smith v. State*, Tex.Cr.App., 541 S.W.2d 831. Thus, unless the charge in the present case *authorized* conviction under Sec. 19.02(a)(2), the error in the court's charge is not fundamental.

In the present case, the charge definded murder abstractly, and then applied this definition to the facts in Paragraph 3A. Although a theory not alleged in the indictment is included in Paragraph 3A, it is important to note that this paragraph is a converse charge, directing acquittal and consideration of the lesser included offense, not directing a finding of guilt. Thus, Paragraph 3A did not authorize a conviction under Sec. 19.02(a)(2), and provided no affirmative guidance for the jury's finding of guilt.

Guidance for the jury is provided in Paragraph 3, which authorized conviction if the jury finds that the appellant committed murder as defined in Sec. 19.02(a)(1), the theory charged in the indictment. Paragraph 3 directs the jury to consider the lesser included offense if it does not find that murder was committed as set out in the indictment.

Although the charge is erroneous and confusing, it does not authorize conviction on a theory not alleged in the indictment. The inclusion of the erroneous language in the

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Tex.Cr.App., 574 S.W.2d 133; *Donald v. State*, Tex.Cr.App., 574 S.W.2d 119; *Fella v. State*, Tex.Cr.App., 573 S.W.2d 548; *Brewer v. State*, Tex.Cr.App., 572 S.W.2d 940; *Whitlow v. State*, Tex.Cr.App., 567 S.W.2d 522; *Jones v. State*, Tex.Cr.App., 566 S.W.2d 939; *Edmond v. State*, Tex.Cr.App., 566 S.W.2d 609; *Shaw v. State*, Tex.Cr.App., 557 S.W.2d 305; *Davis v. State*, Tex.Cr.App., 557 S.W.2d 303; *Robinson v. State*, Tex.Cr.App., 553 S.W.2d 371; *Morter v. State*, Tex.Cr.App., 551 S.W.2d 715.

charge did not enable the jury to return a guilty verdict if they found murder had been committed in any other way than that charged in the indictment. The jury was instructed to return a finding of guilt only if they found that the appellant did "intentionally or knowingly cause the death of an individual, April Dawn Peters, by striking her with his hands." We find no fundamental error in the jury charge. See *Cumbie v. State*, Tex.Cr.App., 578 S.W.2d 732.

Appellant contends that this error in the court's charge was compounded by the prosecutor's final arguments. He maintains that this argument regarding the erroneous charge requires reversal.

The prosecutor stated that:

"The first paragraph of the charge in this cause defines murder. And there is primarily two definitions of murder, a person commits murder if he intentionally and knowingly causes the death of an individual. That means I can plot, plan, lay and wait and shoot somebody, knowingly and intentionally shoot them, that's murder, or intends to cause serious bodily injury and commits an act clearly dangerous to human life that caused the death of an individual. That's the definition that applies to this case, doing an act clearly dangerous to health that results in death, and it's just most assuredly murder. Paragraph two, the Court sets up some definitions, intentionally, knowingly is set up there, aware of the nature of conduct, circumstances exist, bodily injury is set up for you and you can go over those definitions. Paragraph three tracks the indictment, and if that's what you find in a paragraph three, you find him guilty of murder."

No objection was made to this argument.

Unless the arguments of the prosecutor are so prejudicial that no instruction could cure the harm, the failure

to timely object waives any error. *Smith v. State,* Tex.Cr.App., 541 S.W.2d 831; *Rodriquez v. State,* Tex.Cr.App., 530 S.W.2d 944.

Appellant next contends that the trial court erred in failing to charge the jury on the law of accident. Appellant submitted a written requested charge on the law of accident. Although this charge was not a correct charge, it was sufficient to call the trial court's attention to the omission of the charge. *Stiles v. State,* Tex.Cr.App., 520 S.W.2d 894; *Esparza v. State,* Tex.Cr.App., 520 S.W.2d 891.

A charge on accident need not be submitted unless there is some evidence that the act resulting in death was unintentional. *Fazzino v. State,* Tex.Cr.App., 531 S.W.2d 818; *Stiles v. State,* supra. The focus of our inquiry as to whether a charge on accident was required is the appellant's acts, not the results of his acts. *Fazzino v. State,* supra.

In the present case, the appellant testified that his attmept to resuscitate the child was intentional, but that the results were accidental. This evidence does not support submission of a charge on accident. Nor does evidence to the effect that the injuries to the child's head were from an accidental fall compel submission of this charge. The law of accident focuses on the appellant's acts, not causation. No error is shown in the refusal to charge on accident.

Appellant contends "the trial court erred in refusing to include a charge on injuries received as a result of resuscitation."

Appellant directs our attention to the following requested charges which were denied by the court:

(1) "You are instructed no acts done in attempt to resuscitate April Dawn are criminal conduct. Any injury she may sustain during resuscitation would not be the result of a criminal act, therefore if you believe from the evidence or if you have a reasonable doubt that the deceased received injury from the defendant that resulted in her death while attempting resuscitation then the defendant would not be guilty and should be acquitted."

(2) "You are instructed that if you find that the deceased April Dawn Peters, died from injuries sustained in attempting to resuscitate her, then the defendant would not be guilty as charged in the indictment, or if you find the facts so to be, or if you have a reasonable doubt thereof you will aquit the defendant and find him not guilty."

Appellant directs our attention to evidence that the abdominal injuries sustained by the deceased could have resulted from attempted resuscitation.

The evidence reflects that injuries were not limited to the abdominal area. Injuries were also found to the head, the face, the chest, the back, the front surfaces of both thighs, lower legs, inner surface of one thigh and the buttocks. Dr. Petty testified regarding the cause of death as follows:

> "The cause of death really is the multiple injuries that were received, however, the head injuries alone would cause death, and on the other side of the coin, the abdominal injuries, that is the heart, the liver, the spleen and pancreas injuries would cause death without the head injuries, either one could cause death without the other."

The Court has held that a trial court does not err in refusing to submit a charge that singles out limited parts of the evidence. *Laws v. State,* Tex.Cr.App., 549 S.W.2d 738; *Hoover v. State,* Tex.Cr.App., 390 S.W.2d 758; *Dunne v. State,* 98 Tex.Cr.R. 7, 263 S.W.2d 608. The instant case presents a classic example of the problems that arise in giving such a charge. The effect of the appellant's requested charges is to instruct the jury to acquit if it finds that the abdominal injuries were sustained as the result of appellant's efforts to resuscitate the deceased. Such an instruction excludes from the jury's consideration the fact that multiple injuries were inflicted on most of the child's body and the combined effect of all injuries could have been the cause of death. It excludes from the jury's consideration the evidence that the deceased sustained a serious injury to the head which, according to medical testimony, would have caused the death of the deceased independently of other injuries,

By giving the requested charges the court would in effect be telling the jury that the injuries to the abdominal area caused the death of the deceased to the exclusion of all other injuries. Such a charge would clearly be a comment on the weight of the evidence. *See, Hoover v. State,* supra.

No error is shown in the court's action in refusing appellant's requested charge.

Appellant contends that the trial court erred in allowing the prosecutor to inform the jury as to the range of punishment during his argument at the guilt-innocence phase of the trial. Appellant points to three separate portions of the prosecutor's argument in support of this contention.

Two of the three arguments complained of were not objected to on the grounds urged now. Appellant's objection to the third argument was sustained, but no instruc-

tion to disregard was requested. Appellant did not receive an adverse ruling. Nothing is preserved for our review. *Rasberry v. State,* Tex.Cr.App., 535 S.W.2d 871; *Stokes v. State,* Tex.Cr.App., 506 S.W.2d 860.

Appellant next contends that the trial court erred in failing to grant his motion for mistrial based on the prosecutor's jury argument. Appellant contends that the prosecutor's argument stated a personal opinion.

The prosecutor argued:

> "You know, look at the evidence. The Plunkett girl came up and testified that she's sitting out there, she said she saw every bruise, every bruise reflected in these pictures, she said she saw four or five days prior to death. Well, that is just not true."

The trial court sustained the appellant's objection and instructed the jury to disregard the statement.

Normally, when an objection to jury argument is sustained and an instruction to disregard given, any error from the remark is cured. *Rodriquez v. State,* Tex.Cr.App., 552 S.W.2d 451; *Taylor v. State,* Tex.Cr.App., 550 S.W.2d 695. The argument here was not so prejudicial that an instruction could not cure any harmful effect. No error is shown,

Appellant contends that the trial court erred in allowing the prosecutor to argue outside the record. The argument complained of is:

> "MR. GLASGOW [prosecutor]: And can't you imagine he and this girl living in the relationship, sleeping in the same bed together, interfering with their sexual activities, interfering with everying they wanted to do—

"MR. LOFTIN [defense counsel]: Your Honor, again Counsel is completely outside the record, he's completely outside the record.

"THE COURT: Overruled."

The record reflects that the child's mother and the appellant were living together as man and wife. The child's mother testified that the child slept in the same bedroom as she and the appellant did.

Counsel has wide latitude in closing argument. He may draw all inferences that are reasonable and fair so long as those inferences are supported by the evidence and offered in good faith. *Griffin v. State*, Tex.Cr.App., 554 S.W.2d 688; *Jackson v. State*, Tex.Cr.App., 536 S.W.2d 371. This argument was an inference from the evidence regarding possible motives for the appellant's alleged acts. No error is shown.

Appellant finally contends that the trial court erred in allowing the prosecutor to argue facts not in evidence. The argument complained of is:

"He said, I can't tell you in matters of minutes, maybe thirty, maybe forty-five, not more than an hour, sixty minutes. And then he testified that when that injury was inflicted to that heart she died within five minutes. And the defense to this law suit as I think you see it is the girl fell off the bed and fractured her skull. Dr. Petty, as a scientist, said that just didn't happen."

The record reflects that this argument was not outside the record. No error is shown.

The motion for rehearing is granted. The judgment is affirmed.

ROBERTS, ODOM, PHILLIPS and CLINTON, JJ., dissent for reasons stated in original opinion.

APPENDIX E

No. 7268

THE STATE OF TEXAS	§	IN THE 29TH JUDICIAL
VS.	§	DISTRICT COURT OF
LARRY PLUNKETT	§	PALO PINTO COUNTY, TEXAS

CHARGE OF THE COURT

LADIES AND GENTELMEN OF THE JURY:

The defendant, Larry Plunkett, stands charged by indictment with the offense of murder, alleged to have been committed in Palo Pinto County, Texas, on or about the 8th day of January, 1975. The defendant has pleaded not guilty.

1.

Our law provides that a person commits murder if he intentionally or knowingly causes the death of an individual, or intends to cause serious bodily injury and commits an act clearly dangerous to human life that causes the death of an individual.

2.

A person acts intentionally, or with intent, with respect to the nature of his conduct, or to a result of his conduct when it is his conscious objective or desire to engage in the conduct or cause the result.

A person acts knowingly, or with knowledge, with respect to the nature of his conduct or to circumstances surrounding his conduct when he is aware of the nature of his conduct or that the circumstances exist. A person

acts knowlingly, or with knowledge, with respect to a result of his conduct when he is aware that his conduct is reasonably certain to cause the result.

"Bodily injury" means physical pain, illness, or any impairment of physical condition. "Serious bodily injury" means bodily injury that creates a substantial risk of death or that causes death, serious permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ.

3.

Now if you find and believe from the evidence beyond a reasonable doubt that on or about the 8th day of January, 1975, in Palo Pinto County, Texas, the defendant, Larry Plunkett, did intentionally or knowingly cause the death of an individual, April Dawn Peters, by striking her with his hands, as set forth in the indictment, then you will find the defendant guilty of murder as charged in the indictment.

Unless you so find beyond a reasonable doubt, or if you have a reasonable doubt thereof, you will acquit the defendant and find him not guilty of murder and consider whether he is guilty of the lesser offense of involuntary manslaughter.

3A.

You are instructed that to be guilty of murder, a defendant must have acted intentionally or knowingly in causing the death of the deceased. He must have intentionally or knowingly caused the death, or he must have intended to cause serious bodily injury and have committed an act clearly dangerous to human life that caused the death of deceased. Unless defendant so acted intentionally or knowingly or with intent to cause serious bodily injury to the deceased, he cannot be convicted of murder.

Therefore, if you find from the evidence beyond a reasonable doubt that the defendant, Larry Plunkett, did cause the death of April Dawn Peters by striking her with his hands, but you have a reasonable doubt that the defendant did intentionally or knowingly cause death or that he intended to cause April Dawn Peters serious bodily injury, then you will acquit the defendant of murder, and will consider whether or not he is guilty of involuntary manslaughter.

4.

A person commits the offense of involuntary manslaughter if he recklessly causes the death of an individual. "Individual" means a human being who has been born and is alive.

A person acts recklessly, or is reckless, with respect to circumstances surrounding his conduct or the result of his conduct when he is aware of but consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint.

5.

Therefore, if you believe from the evidence beyond a reasonable doubt that the defendant, Larry Plunkett, did in Palo Pinto County, Texas, on or about the 8th day of January, 1975, recklessly cause the death of an individual, to-wit; April Dawn Peters, by striking her with his hands, you will find the defendant guilty of involuntary manslaughter as charged in the second count of the indictment.

Unless you so find beyond a reasonable doubt, or if you have a reasonable doubt thereof, you will find the defendant not guilty of involuntary manslaughter and consider whether he is guilty of the lesser offense of criminally negligent homicide.

6.

A person committs the offense of criminally negligent homicide if he causes the death of an individual by criminal negligence. "Individual" means a human being who has been born and is alive.

A person acts with criminal negligence, or is criminally negligent, with respect to circumstances surrounding his conduct when he ought to be aware of a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances viewed from the actor's standpoint.

A person is criminally responsible if the result would not have occurred but for his conduct, operating either alone or concurrently with another cause, unless the concurrent cause was clearly sufficient to produce the result and the conduct of the actor clearly insufficient.

7.

Therefore, if you believe from the evidence beyond a reasonable doubt that the defendant, Larry Plunkett, did in Palo Pinto County, Texas on or about the 8th day of January, 1975, cause the death of April Dawn Peters by criminal negligence as above defined, by striking her with his hands, you will find the defendant guilty of criminally negligent homicide.

If you have a reasonable doubt as to whether the defendant is guilty of criminally negligent homicide, or of any other offense defined in this charge, you will acquit the defendant, and say by your verdict "not guilty".

8.

This is a case depending for conviction on circumstantial evidence. In order to warrant a conviction of a crime on circumstantial evidence, each fact necessary to the conclusion sought to be established must be proved by competent evidence beyond a reasonable doubt; all the facts (that is, the facts necessary to the conclusion) must be consistent with each other and with the main fact sought to be proved, and the circumstances, taken together, must be of a conclusive nature, leading, on the whole, to a satisfactory conclusion and producing, in effect, a reasonable and moral certainty that the accused, and no other person, committed the offense charged. But in such cases it is not sufficient that the circumstances coincide with, account for and therefore render probable the guilt of the defendant. They must exclude, to a moral certainty, every other reasonable hypothesis except the defendant's guilt, and unless they do so beyond a reasonable doubt, you will find the defendant not guilty.

9.

You are instructed that if you find that the deceased, April Dawn Peters, died from injuries sustained in an accidental fall from a bed, and not from any act done by the defendant, then the defendant would not be guilty as charged in the indictment, and if you find the facts so to be, or if you have a reasonable doubt thereof, you will acquit the defendant and find him not guilty.

For your guidance in arriving at a verdict in this case, you are also instructed as follows:

(a) You are instructed that you have a right to consider all of the circumstance surrounding the occurrences referred to in this case as shown by the evidence, and to draw, such reasonable inferences from the facts and circumstances proven, if any, as are natural, and reasonably follow therefrom; however, you are instructed that you cannot presume any fact against the defendant, but that you must resolve every reasonable doubt in favor of the defendant, and the law of reasonable doubt extends to every phase of the case, so if you have a reasonable doubt as to any fact or circumstance in evidence before you, you must resolve such doubt in favor of the defendant.

(b) In all criminal cases the burden of proof is upon the State. The defendant is presumed to be innocent until his guilt is established by legal and competent evidence beyond a reasonable doubt.

(c) You are instructed that you are not to allow yourselves to be influenced in any degree whatsoever by what you may think or surmise the opinion of the Court to be respecting any matter of fact involved in this case. If you have observed anything which you have or may interpret as the Court's opinion upon any matter of fact in this case, you must wholly disregard it. You should not attempt to satisfy what you may think or fancy to be the opinion of any person connected with the trial of this case, but your verdict, whatever it may be, must be the result of your deliberate judgment based solely upon the law as given you in charge by the Court and the evidence submitted under the rulings of the Court.

(d) You are instructed that you should not question the baliff concerning the testimony or the law of the case, nor should you discuss the case in his or her presence. If you have any questions, you should reduce then to writing, be signed by your foreman, and present them to the Court.

(e) You are instructed that any statements of counsel, made during the course of the trial or during argument, not supported by the evidence, or statments made by counsel, not in harmony with the law as stated to you by the Court in these instruction, are to be wholly disregarded.

(f) You are instructed that the indictment in this case is not any evidence of the defendant's guilt; and no juror should permit himself to be to any extent influenced against the defendant because of said indictment.

(g) You are instructed that it is the purpose of the law to try a case solely on the law and the evidence. You can only consider facts and circumstances in evidence, and you must not consider or receive from any source facts or circumstances that have not been introduced by testimony before you. It is not proper for any juror to discuss or to mention to any other juror anything which he may have heard or read on the outside of the case. If any juror should discover that he has any outside information or has heard anything concerning the parties to the case, or any of the witnesses, or anything concerning the case, such juror should not impart such outside information to any other juror, nor should he consider the same himself in arriving at a verdict.

After the argument of counsel, you will retire, select one of you number foreman and consider your verdict and as you find, so say, and write your verdict on a separate piece of paper. You verdict must be unanimous, and be in writing and signed by your foreman.

/s/ Herman Fitts

Judge Presiding

APPENDIX F

IN THE NAME AND BY AUTHORITY OF THE STATE OF TEXAS

The Grand Jurors of the County of Palo Pinto, State of Texas, duly selected, impaneled, sworn, charged and organized as such at the March Term, A.D. 1976, of the 29th Judicial District Court of said County, upon their oaths present in and to said Court, that Larry Plunkett, on or about the 8th day of January, A.D. 1975, and before the presentment of this indictment, in said County and State, did then and there intentionally and knowingly cause the death of an individual, April Dawn Peters, by striking her with his hands;

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present in and to said Court that on or about the 8th day of January, A.D., 1975, in said county and state and anterior to the presentment of this indictment, Larry Plunkett did then and there recklessly cause the death of an individual, April Dawn Peters, by striking her with his hands;

AGAINST THE PEACE AND DIGNITY OF THE STATE.

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Foreman of the Grand Jury.